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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 20590
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B5

[REDACTED]
DATE: SEP 06 2012 Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to employ the beneficiary permanently in the United States as a controller. As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (USDOL). The director determined that the petitioner had not established that the beneficiary possesses the required experience for the offered position as set forth in the ETA Form 9089.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b), states in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Here, the ETA Form 9089 was accepted for processing on August 26, 2010. The proffered wage is \$120,750 per year and the position requires a Master's degree in finance or accounting and five years experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner was established in 1955, had a gross annual income of \$ [REDACTED] and employed [REDACTED] workers when the Form I-140 was filed. On the ETA Form 9089, signed by the beneficiary on November 10, 2010, she claimed to have worked for the petitioner since August 5, 2008.

The petitioner described the job duties of Controller on ETA Form 9089 Part H, Line 11 as follows:

Plan, direct and coordinate the financial affairs of the hospital, particularly directing and supervising the functions of accurate financial reporting, maximizing reimbursements and coordinating a formal budget and forecasting program. Maintains a complete and accurate record of the hospitals [sic] assets, liabilities and

financial transactions. Responsible for planning, coordinating, and directing the activities of the accounting department which currently includes 15 employees. Reports directly to the Chief Financial Officer.

The key to determining the job qualifications is found on ETA Form 9089 Part H, the "Job Opportunity Information" section. This part describes the terms and conditions of the job offered. Part H, Line 4, reflects that a Master's degree is the minimum level of required education and Line 4-B indicates that finance shall be the major field of study. Line 7 provides that there is an alternate field of study that is acceptable and Line 7-A specifies that field to be accounting. Line 6-A indicates that 60 months is the minimum level of experience required in the job offered and Line 10 specifies that experience in an alternate occupation is not acceptable. Counsel states that "The experience was not specifically spelled out but did state, experience in a related occupation was acceptable." However, it is clear that the petitioner required 60 months experience as a controller as its minimum experience requirement.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. See generally *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying the *plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the USDOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On appeal, counsel states:

Petitioner's I-140 was improperly denied because based on the totality of the evidence, [REDACTED] qualifies for the position of Controller. On the labor certification, the petitioner requested a Master's degree in either Accounting or Finance and 60 months of experience. The fact is the job description of a Controller has many of the same requirements as someone with Finance and accounting experience. For that reason, job experience in an alternative occupation was not marked. The purpose of the labor certification is to establish the minimum requirements, prevailing wage and to prove recruitment efforts have shown that no US qualified workers will be displaced. In all of their efforts to recruit other workers, petitioner's [sic] never singled out the type of experience required. They specifically asked for someone with a Master's Degree in Accounting or Finance and 60 months of experience. The denial of this I-140 was based on a mere technicality and again

one easily excused because the job descriptions of a Controller, Accountant and Financier are so similar.

Counsel states that the purpose of the labor certification is to establish the minimum requirements, prevailing wage and prove recruitment efforts have shown that no US qualified workers will be displaced. As proof, counsel submits recruitment documents that the petitioner issued for the controller position. Counsel further states that in all of its efforts to recruit other workers, the petitioner never singled out the type of experience required and specifically sought out an employee with a Master's Degree in Accounting or Finance and 60 months of experience.

Counsel forwards the petitioner's internet advertisement for the position of controller issued on an indiscernible date. The posting outlines the duties of the position but provides no experience requirement. Counsel also forwards a "[REDACTED] Job Order Print Document" dated June 7, 2010 showing a Master's Degree requirement for a job titled "Treasurers and Controllers" requiring 60 months of experience. Counsel submits three of the petitioner's advertisements for controller from unspecified publications requiring a Master's Degree in Accounting or Finance plus 5 years experience. The internet posting specifies no experience requirement and the Louisiana Job Order Print Document and the three advertisements require 60 months experience. Absent additional information in these documents, this 60 months experience requirement would call for that experience to have been accumulated while working as a controller. Since this is exactly what the ETA Form 9089 requires, USCIS may not ignore the term of the labor certification. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

The regulation at 8 C.F.R. § 204.5(g)(1) requires:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The pertinent evidence of the beneficiary's experience is described below:

1. An undated experience letter from CA IB signed by [REDACTED] Executive President & CEO, in Bucharest, Romania, who certifies the beneficiary was employed by [REDACTED] part-time from July 1998 until September 1999 and full-time from September 1999 until January 2001 as a financial analyst. Her main responsibilities were as follows:

As a full-time employee

- Conducted company and sector research;

- Prepared client presentations, company and industry profiles;
- Developed new business leads;
- Developed marketing materials and bid proposals;
- Provided assistance in client negotiations;
- Advised on and participated in the financial aspects of contracts and bid proposals.

As a part-time employee

- Conducted company and sector research;
- Prepared client presentations, company and industry profiles.

2. A Certificate of Employment from European Bank for Reconstruction and Development dated [REDACTED] from [REDACTED] Assistant, [REDACTED] who certifies that the beneficiary was employed by the organization between [REDACTED] [REDACTED] as a full time professional staff member and that her position held on leaving was that of a "Programme Analyst" for "Banking Special Programmes."

3. Experience letters dated [REDACTED] and [REDACTED] from [REDACTED] [REDACTED] who certifies the beneficiary was employed by the corporation from [REDACTED] until [REDACTED] in the capacity of Controller. He states that during that time she was responsible for all aspects of the company's finances which at the time had revenue in excess of \$12 million and over 53 full-time employees.

The issue in this proceeding is whether the petitioner has furnished sufficient credible evidence to demonstrate that the beneficiary had attained five years of experience in the job offered of controller along with the attainment of her Master of Business Administration degree from [REDACTED] in New Orleans, Louisiana, that she earned on May 22, 2004, to be found qualified for the proffered position.

The experience letters from [REDACTED] (Item # 1 above) and [REDACTED] (Item # 2) specify the beneficiary obtained experience in alternate occupations as a financial analyst and as a "programme analyst." These periods of employment do not count toward the beneficiary's 60 month experience requirement because the ETA Form 9089 specifies that experience in an alternate occupation is not acceptable. The job duties as described in these letters do not establish that the beneficiary was performing the duties of the offered position. For example, the job offered entails planning, directing, and coordinating the hospital's financial affairs, an organization employing over 1,400 people. The beneficiary has not been described as performing such high-level duties in these previous positions. The letter from [REDACTED] (Item # 3) indicates that the beneficiary worked for the corporation as a controller for three years and six months. Based on the evidence provided, it is determined that the number of years experience that she attained working for these

three employers fell far short of the required five years of experience in the job offered, controller. It is further noted that the beneficiary's experience working with the petitioner in the proffered position before the priority date may not be used to qualify her for the job. The petitioner indicated in response to Question J-21 in the ETA Form 9089 that the beneficiary did not gain any of the qualifying experience with the petitioner in a substantially comparable position.

The record does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.